

Deposition Designations for:

JEFFREY POSNER
May 6, 2009

Deposition Designation Key

CI = Certain insurers (green)

**CNA = Continental Cas. Co &
Continental Ins. Co. (red)**

PP's = Plan Proponents (blue)

Obj: = Objection

Ctr = Counter Designation

R = Relevance

BE = Best Evidence

F = Foundation

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In Re: _____ X Chapter 11
Case No.
01-01139 JKF
W.R. Grace & Co., et al.,
Debtors. (Jointly Administered)
_____ X

— — —
May 6, 2009
— — —

DEPOSITION of JEFFREY POSNER, held
at the offices of Kirkland & Ellis, 655
Fifteenth Street, N.W., Washington, DC,
commencing at 9:08 A.M., on the above
date, before Lisa Lynch, a Registered
Merit Reporter, New Jersey Certified Court
Reporter, License No. XI00825, and
Certified Realtime Reporter

— — —
MAGNA LEGAL SERVICES, LLP
7 Penn Center, 8th Floor
1635 Market Street
Philadelphia, PA 19103
1.866.MAGNA.21

Key

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(Notice of Deposition of Jeffery Posner received and marked for identification as Posner Exhibit 1.)

(Curriculum vitae of Jeffery M. Posner received and marked for identification as Posner Exhibit 2.)

(Affidavit Under 11 USC 327(e) received and marked for identification as Posner Exhibit 3.)

JEFFREY POSNER,
having been sworn by the Notary Public of the States of New York and New Jersey, was examined and testified as follows:

EXAMINATION BY
MS. FORSHAW:

Q. Good morning. Mr. Posner.

A. Good morning.

Q. Good to see you again. I

or nine copies of exhibits which I'll pass out through the deposition. You can put that aside. For the record, I've marked the Notice of Deposition of Jeffery Posner as Exhibit 1.

BY MS. FORSHAW:

Q. Mr. Posner, let me put before you what I've marked as Exhibit 2, which is a resume of Jeffery Posner. Do you recognize this document as your resume?

A. Yes, but it appears to me to be an outdated copy of it.

Q. Okay. And for the record, can you tell us in what way is this resume outdated?

A. My business address, it's an old business address which leads me to believe that's a version that I kept several years ago.

Q. Is the professional experience described in your resume true and accurate?

know you've been through this drill many times. If I talk too fast, just stop me. If you have any questions about my questions, let me know. If you need to take a break, let me know.

A. Definitely.

Q. Okay. I'm just --

MR. KRAMER: I'm sorry. Who's asking the questions, please?

MS. FORSHAW: Sure. It's Mary Beth Forshaw from Simpson Thacher representing Travelers Casualty. If you guys have a hard team hearing us, will you let us know?

MS. KRIEGER: Yes, we will. Thank you.

Q. Mr. Posner, I'm going to put before you a Notice of Deposition of Jeffery Posner. Do you understand you're here to testify in response to that notice today?

A. Yes, I do.

MS. FORSHAW: I have eight

A. Yes, I'm sure it is.

Q. And this resume indicates that you were employed at W.R. Grace & Company from 1982 to 1999. Is that correct?

A. Yes, it is.

Q. And for the record, can you give us an overview of your employment experience at W.R. Grace listing your positions and the approximate years you held each position?

A. I started with Grace in 1982 as an assistant claims manager. In 1986 I assumed the duties of a risk analyst. Thereafter I became the assistant director of risk management sometime, I think, in 1987 and then in 1988 I was promoted to the director of risk management and I became an assistant vice president of the company.

Q. And during your tenure at W.R. Grace, were you responsible for overseeing asbestos-related coverage litigations?

Page 18

Page 20

A. Yes, I was.

Q. And when did those duties commence?

A. Well, Grace's coverage litigation began in 1983 and I became involved at that time and ultimately assumed additional responsibilities as the litigation had progressed through the years.

Q. And I note that your resume says at the top that you in the past have negotiated one billion of insurance settlements relating to asbestos and environmental litigation. Do you see that? It's under Summary of Qualifications.

A. Yes, I do.

Q. Were those negotiations, negotiations on W.R. Grace's behalf?

A. Yes. I mean, there may have been some other negotiations but principally it's W.R. Grace.

Q. Okay. And at W.R. Grace, did you negotiate settlements with my

Q. And after the settlements were signed, were you responsible for administering the settlements?

MS. ESAYIAN: Objection to form. You can answer if you can.

A. I was involved. There were people that were actually doing the detail work. You know, it involved keeping track of payments of claims and things of that nature and sending out bills. I didn't do that but I was involved and had some oversight responsibility for that.

Q. Let me restate the question. Were you involved in ensuring that Grace performed its obligations under the settlements Grace had executed with Travelers Casualty?

MR. HORKOVICH: Objection, compound.

THE WITNESS: Can I have that read back, please?

(The reporter reads the pending question.)

A. I certainly had a role in

Page 19

Page 21

client, Aetna Casualty & Surety Company, which I'm going to call Travelers Casualty interchangeably because it's changed its name?

A. Yes, I did.

Q. And do you recall generally when those settlements with Travelers Casualty were signed up?

A. The first one involving some old policies from one of the predecessor companies, I'm speculating a little, but it was probably sometime in the early '90's and then there was a settlement involving the excess policies, and that probably was later on in the '90's, I suspect. I can't remember the precise dates.

Q. And were you the person at Grace who was principally responsible for negotiating with Travelers Casualty?

A. Yes, I was.

Q. With respect to both settlements?

A. Yes.

that.

Q. Who else was involved in making sure that Grace performed its obligations under the settlements Grace executed with Travelers Casualty?

A. Well, the settlements required Grace to obtain certain information so we had to put procedures in place to ensure that that information was obtained, that we kept track of that information, and that we allocated -- allocated claim payments in accordance with the procedures set forth in the agreement. So there were a number of people. Obviously, outside counsel was involved in providing information to us, we had people in-house, we had computer programmers that were programming the computers and writing programs for the process. So there were a number of people in the process but certainly I was, you know, involved in ensuring that those procedures were in place and that the proper information was obtained and, you

CI

PP's
Obj: R Page 34

1 **Q. And what oversight**
2 **responsibility have you had in that**
3 **respect?**

4 A. Well, I think my duties
5 have really not changed. I mean, I think
6 Grace looks to me to ensure that we're
7 complying with whatever requirements are
8 in those settlement agreements and there
9 are people at Grace, again, that perform
10 various functions but I think it's fair to
11 say that Grace relies on me to ensure that
12 we're complying with whatever is
13 necessary.

14 **Q. And since 1999, has Grace**
15 **employed anyone in-house who has had**
16 **insurance-related functions?**

17 A. No, I'm really the only
18 person. And there are other people there
19 who were there before I left who assisted,
20 for example, in the allocation issue,
21 computer programmers, people of that sort.
22 But, no, Grace does not have an in-house
23 insurance person. I'm really the only
24 insurance person.

CI

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1 "consulting services to the debtors and
2 the firm has consented to provide such
3 services."

4 **Q. And have you in fact**
5 **provided such services to the debtor**
6 **during the pendency of its bankruptcy?**

7 A. Yes, I have.

8 **Q. And can you outline for us**
9 **generally the nature of the services you**
10 **provided to Grace during its bankruptcy?**

11 A. Again, I think it's many of
12 the services that I provided while I was
13 an employee. I continue to purchase their
14 insurance and I'm responsible for the
15 administration of all of their worldwide
16 insurance policies and I continue to be
17 involved in asbestos insurance coverage
18 issues and environmental insurance
19 coverage issues as they arise. I've
20 negotiated some settlements, you know,
21 since I left the firm with insurance
22 carriers, I think principally ones in
23 bankruptcy. As I recall, there may have
24 been some others. So again I'm performing

PP's
Obj: RPP's
Obj: R 35

1 **Q. Now, it's my understanding**
2 **that you have worked for Grace during the**
3 **period when Grace has been in Chapter 11.**
4 **Is that correct?**

5 A. Yes.

6 **Q. And I'm going to put before**
7 **you what I've marked as Posner Exhibit 3,**
8 **which is entitled Affidavit Under 11 USC**
9 **327(e). Do you recognize that document?**
10 **(The witness reviews the document.)**

11 A. I actually don't. I mean,
12 it appears that I signed it. I don't
13 remember it.

14 **Q. Does your handwriting**
15 **appear on page one of the document, Mr.**
16 **Posner?**

17 A. Yes, it does.

18 **Q. Okay. And if you could --**
19 **I actually couldn't read Paragraph 2. Can**
20 **you read the handwriting that appears in**
21 **Paragraph 2?**

22 A. It says, "The debtors have
23 requested that the firm provide insurance
24 and risk management" -- I think that says

CI

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1 many of the same functions that I
2 performed while an employee and I've been
3 involved in issues related to bankruptcy
4 as they pertain to insurance coverage.

5 **Q. And what are your**
6 **compensation arrangements with Grace?**

7 A. I think my retainer is
8 either 130 or \$135,000 a year. I can't
9 remember the precise number.

10 **Q. And is that a flat fee that**
11 **you're paid for providing**
12 **insurance-related services to Grace?**

13 A. Yes. I mean, it gets
14 negotiated every year but basically they
15 deposit money in my bank. I don't get any
16 hourly rate. I don't get additional
17 compensation beyond that nor do I get less
18 compensation.

19 **Q. I am sorry, I didn't --**

20 A. Nor do I get less
21 compensation. I get what the agreed-upon
22 amount is.

23 **Q. It's a flat fee?**

24 A. It's a flat fee, yes.

PP's
Obj: RPP's
Obj: R

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<p>1 Q. And have you been involved 2 in drafting Grace's Plan of 3 Reorganization; yes or no?</p> <p>4 MS. ESAYIAN: Objection to 5 form. You can answer if you can.</p> <p>6 MR. HORKOVICH: Objection, 7 overbroad.</p> <p>8 A. I'm not sure I can answer 9 that yes or no. I was involved in some of 10 the insurance provisions. I don't know 11 that I drafted them but they were given to 12 me to look at and I commented on them and 13 I may have changed the wording in some of 14 the provisions that were drafted. I 15 didn't directly draft it but I have had 16 input into some of the insurance issues.</p> <p>17 Q. Have you read the plan 18 cover to cover?</p> <p>19 A. No.</p> <p>20 Q. Are you familiar with the 21 W.R. Grace Asbestos Personal Injury Trust 22 Agreement?</p> <p>23 A. I believe I've seen it.</p> <p>24 Q. Did you comment on that</p>	<p>1 me some of the Plan documents. I really 2 didn't look at them, to be honest with 3 you. She had them available. I just 4 skimmed them.</p> <p>5 Q. Have you reviewed any 6 objections filed by insurers in W.R. 7 Grace's bankruptcy proceeding?</p> <p>8 A. I may have. I don't know, 9 sitting here.</p> <p>10 Q. Are you familiar with the 11 nature of the objections filed by W.R. 12 Grace's insurers in its bankruptcy 13 proceeding?</p> <p>14 MS. ESAYIAN: Objection to 15 form.</p> <p>16 A. I couldn't give you 17 specifics, sitting here.</p> <p>18 Q. Do you have any 19 understanding of the nature of the 20 objections that the insurers have posed in 21 W.R. Grace's bankruptcy proceeding?</p> <p>22 MR. HORKOVICH: Objection 23 to form.</p> <p>24 A. I have a recollection of</p>
Page 39	Page 41
<p>1 document?</p> <p>2 A. Can you show me that 3 document? I don't believe I did but if 4 you show me the document, I'd be able to 5 tell you. I can't -- I can't talk in a 6 vacuum.</p> <p>7 Q. Okay, we'll do that later 8 in your deposition. We'll go through each 9 document.</p> <p>10 Are you being paid for providing 11 testimony here today?</p> <p>12 A. No.</p> <p>13 Q. Did you prepare for this 14 deposition?</p> <p>15 A. Well, I met with Miss 16 Esayian yesterday and I looked at some 17 documents.</p> <p>18 Q. How long did you meet with 19 Miss Esayian?</p> <p>20 A. Probably just about two 21 hours or so yesterday afternoon.</p> <p>22 Q. And how many documents did 23 you review?</p> <p>24 A. Well, she put in front of</p>	<p>1 some issues relating to insurance 2 neutrality. Beyond that, I'm not sure I 3 know.</p> <p>4 Q. Were you consulted by Grace 5 with respect to Grace's responses to any 6 requests for admission served in Grace's 7 bankruptcy proceeding?</p> <p>8 A. I probably was.</p> <p>9 Q. Do you recall 10 specifically?</p> <p>11 A. I don't.</p> <p>12 MS. FORSHAW: I'd like to 13 mark Asbestos Settlement Agreement 14 between W.R. Grace & Company-Conn. 15 and the Aetna Casualty & Surety 16 Company dated May 12th, 1996 as 17 Posner Exhibit 4.</p> <p>18 (Asbestos Settlement 19 Agreement between W.R. 20 Grace & Company-Conn. and the Aetna 21 Casualty & Surety Company dated May 22 12th, 1996 received and marked for 23 identification as Posner Exhibit 24 4.)</p>

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1 A. In what sense? I don't --

2 **Q. Well, are you aware of any**
3 **of the obligations provided for, for**
4 **example, the release or indemnity**
5 **obligations under the settlement**
6 **agreements, that the Trust will not be**
7 **able to perform?**

8 MS. ESAYIAN: Objection to
9 form.

10 MR. HORKOVICH: Objection
11 to form.

12 A. You keep saying "not be
13 able to". You mean not be able to because
14 they don't have the money to do it or they
15 don't have the manpower? I'm not trying
16 to be cute. But you're saying "would not
17 be able to". Why wouldn't --

18 **Q. Well, are you aware of any?**

19 MR. HORKOVICH: Objection
20 to form.

21 A. I mean, I don't really know
22 that much about the Trust to know what
23 their capabilities are, whether it be
24 financial capabilities or otherwise. I

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1 mean, my assumption is that they will do
2 that but I don't know what their
3 capabilities are. I don't even know that
4 it's been formed yet.

5 **Q. Is it your understanding**
6 **that the Trust will indemnify Maryland**
7 **Casualty under the settlement agreements**
8 **in the same way that Grace agreed to**
9 **indemnify Maryland Casualty?**

10 MR. HORKOVICH: Objection
11 to form.

12 A. Again, that's my non-legal
13 assumption.

14 **Q. Okay. And that would apply**
15 **to Zurich as well --**

16 MR. HORKOVICH:
17 Objection.

18 **Q. -- under a settlement**
19 **agreement, to the extent there's**
20 **obligations.**

21 A. To the extent --

22 MR. HORKOVICH:
23 Objection.

24 A. To the extent there's an

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1 indemnity agreement, again, that's my
2 non-legal assumption.

3 **Q. You would agree that the**
4 **settlement agreements with Maryland**
5 **Casualty and Zurich are being transferred**
6 **and will be transferred to the asbestos PI**
7 **Trust upon confirmation and that all**
8 **rights and obligations thereunder? You**
9 **would agree with me on that?**

10 MR. HORKOVICH: Objection
11 to form.

12 A. You know, the Plan speaks
13 for itself. Again, that is what I
14 understand but I'm not an expert on the
15 Plan but that's my understanding.

16 **Q. And that understanding is**
17 **consistent with your prior testimony today**
18 **with respect to Travelers? It's the same**
19 **answer?**

20 A. Correct, yes.

21 MR. LONGOSZ: Just bear
22 with me. I'm trying to cut down on
23 the questions.

24 That's it. Thank you.

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1 THE WITNESS: Thank you,
2 sir.

3 (Off the record.)

4 MR. BROWN: We've just had
5 a discussion off the record
6 concerning Grace policies and the
7 proposal on the table to avoid the
8 necessity of showing Mr. Posner a
9 whole bunch of policies is that the
10 parties, or at least certain of the
11 parties, who were interested in
12 having a stipulation only on the
13 authenticity and admissibility of
14 policies will work outside this
15 deposition on such a stipulation
16 with the notion being that that
17 stipulation would apply for
18 purposes of the bankruptcy case
19 only.

20 And for my clients, GEICO,
21 Republic and Seaton in particular,
22 it would involve our policies as
23 well as the underlying policies
24 issued by London and possibly CNA

PP's
Obj: 12

<div>CI</div> <div>Page 266</div>	<div>PP's Obj: R</div> <div>Page 268</div>
<p>1 that may have implications for the 2 terms of our policies. 3 Does that accurately state 4 what we're attempting to do? 5 MR. HORKOVICH: It's fine 6 with the ACC that we enter into a 7 stipulation with regard to the 8 terms and conditions of the 9 insurance policies limited -- the 10 stipulation limited only for 11 purposes of the bankruptcy 12 proceeding and not being applicable 13 for any ensuing insurance coverage 14 litigation. 15 MR. BROWN: Is that true 16 for the debtors as well? 17 MS. ESAYIAN: It's fine for 18 the debtors. I'm happy to do it 19 that way. 20 MR. MUELLER: On behalf of 21 the London Market Companies, I 22 don't think we're opposed in 23 principle to a stipulation, but 24 today is really the first time it's</p>	<p>1 testimony to be that there were 2 disputes as to pre-1953 policies. 3 MR. SCHIAVONI: Are you 4 going to ratify the settlement 5 agreement -- 6 MS. ESAYIAN: Okay, wait a 7 minute. Time out. Michael has the 8 floor for questioning. He either 9 has questions about his insurance 10 policies or not. You guys, we can 11 work this out separately for the 12 Royal policies. It's not -- we 13 shouldn't be taking Mr. Posner's 14 time on this right now because 15 that's not -- 16 MR. HORKOVICH: OneBeacon 17 has the floor. 18 MS. ESAYIAN: -- what 19 Michael's issue is. 20 MR. BROWN: Jonathan, on 21 behalf of the PI FCR, you're on 22 board with this proposal? 23 MR. GUY: On behalf of the 24 PI FCR, we are on board with trying</p>
<div>Page 267</div>	<div>Page 269</div>
<p>1 been discussed with me so I'm not 2 prepared to say that we'd be 3 willing to enter into one today. 4 MR. COHN: And what's 5 Royal's position on that in terms 6 of authentication of those 7 policies? 8 MR. SCHIAVONI: If policies 9 are missing or there's no proof of 10 their existence, I'm not going to 11 stipulate to them. Why should I? 12 I don't understand your position. 13 MS. ESAYIAN: I'm not sure 14 that that's what anybody said. 15 MR. COHN: As to the former 16 policies that can be -- where 17 somebody can produce a copy of a 18 policy, are you prepared -- 19 MR. SCHIAVONI: Didn't you 20 listen to the testimony about the 21 settlements? There was disputes 22 about the existence of the 23 policies. 24 MR. COHN: I understood his</p>	<p>1 to work through the authenticity 2 and admissibility of insurance 3 policies by stipulating as to those 4 particular policies. 5 MR. BROWN: All right. 6 MR. SCHIAVONI: Dan, if you 7 have questions about the policy, 8 you should ask them now. 9 CI MR. BROWN: After I finish. 10 EXAMINATION BY 11 MR. BROWN: 12 Q. Mr. Posner, Michael Brown. 13 I'm here on behalf of OneBeacon American 14 Insurance Company, Seaton Insurance 15 Company, GEICO and Republic. 16 Are you generally familiar with the 17 restructuring transactions involving 18 Grace, the one that took place in or 19 around May -- excuse me -- in or around 20 September 1996 and the other in March of 21 1998? 22 A. I'm generally familiar, 23 yes. 24 Q. Okay.</p>

PP's
Obj: R

1 A. This is the settlement
2 agreement entered into by Grace and
3 Commercial Union in 1998, I'm going to
4 call it, relating to environmental claims
5 but it may encompass more than that but I
6 remember it as the environmental
7 settlement agreement.

8 **Q. Okay. Do you recognize the**
9 **signatures on page 25 and 26?**

10 A. Yes, I do.

11 **Q. Who signed on behalf of**
12 **W.R. Grace & Co.?**

13 A. Paul McMahon signed on
14 behalf of Grace and James McKay signed on
15 behalf of Commercial Union.

16 **Q. Were you involved in the**
17 **negotiation of this settlement**
18 **agreement?**

19 A. Yes, I was.

20 **Q. And were the payments that**
21 **were contemplated by this settlement**
22 **agreement made?**

23 A. Yes, they were.

24 **Q. Do you know whether the**

1 asbestos-related claims under an excess
2 policy issued by Unigard to Grace.

3 **Q. Were you involved in the**
4 **negotiation of this agreement?**

5 A. Yes, I was.

6 **Q. Can you identify the**
7 **signatures that appear on page 16, SEA**
8 **16?**

9 A. Yeah, Brian Burns signed it
10 on behalf of W.R. Grace and I can't make
11 out the signature of the Unigard person.

12 **Q. Okay. Were the payments**
13 **contemplated by this agreement made?**

14 A. Yes.

15 (Settlement Agreement,
16 Release and Indemnification/Hold
17 Harmless Agreement Bates stamped
18 SEA 17 through 31 received and
19 marked for identification as Posner
20 Exhibit 19.)

21 **Q. All right, Mr. Posner, you**
22 **now have before you Posner-19 and my first**
23 **question with respect to this document is:**
24 **Can you identify it for me?**

1 **company on page 35 that's listed as W.R.**
2 **Grace & Co. is the lead debtor in this**
3 **bankruptcy case today?**

4 MS. ESAYIAN: Page 25, you
5 mean?

6 MR. BROWN: Yes, page 25.

7 OB 91 is the Bates number.

8 A. I assume that it is but
9 it's an assumption.

10 **Q. Okay.**

11 (Settlement Agreement,
12 Release and Indemnification/Hold
13 Harmless Agreement Bates stamped
14 SEA 1 through 16 received and
15 marked for identification as Posner
16 Exhibit 18.)

17 **Q. You have before you a**
18 **document marked Posner-18 and my first**
19 **question is: Can you identify this**
20 **document?**

21 A. This is a settlement
22 agreement entered into by Grace with
23 Unigard -- it's called Unigard Insurance
24 Company here -- relating to

1 A. This is another agreement
2 between Grace and Unigard -- here it says
3 Unigard Security Insurance Company. I
4 guess the other one does as well --
5 involving another excess policy that
6 Unigard had issued to Grace and this
7 settlement appears to relate to
8 asbestos-related claims.

9 **Q. And it's dated from May of**
10 **1995?**

11 A. That is correct.

12 **Q. And the two Grace entities**
13 **that executed the agreement are W.R. Grace**
14 **& Co.-Conn. and W.R. Grace & Co.,**
15 **correct?**

16 A. Correct.

17 **Q. And you signed it on behalf**
18 **of both of those entities?**

19 A. That is correct.

20 **Q. Can you tell me what name**
21 **W.R. Grace & Co. goes by today that is the**
22 **entity that signed this agreement?**

23 A. Well, W.R. Grace &
24 Co.-Conn. still exists. W.R. Grace & Co.

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1 a sub of one of the entities.

2 MR. BROWN: Okay, all
3 right. Subject to --

4 A. That's an assumption.

5 MR. BROWN: Subject to
6 other -- follow-up after others
7 have questioned, I am complete.
8 Thank you, Mr. Posner.

9 THE WITNESS: Thank you.

10 MS. DeCRISTOFARO: Could we
11 take a five-minute break?

12 MS. ESAYIAN: Sure.

13 (Recess taken.)

14 (LexisNexis printout in re:
15 Maryland Casualty v. Grace, et al.
16 received and marked for
17 identification as Posner Exhibit
18 22.)

19 EXAMINATION BY

20 MS. DeCRISTOFARO:

21 Q. Good afternoon, Mr. Posner.

22 A. Good afternoon.

23 Q. I'm Elizabeth DeCristofaro.

24 I represent Continental Casualty. I have

PP's
Ctr.

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1 a few follow-up questions to issues that
2 you addressed earlier.

3 I just asked the reporter to mark a
4 copy of a legal case in one of the series
5 of cases known as Maryland Casualty v.
6 W.R. Grace. It's a decision of the Second
7 Circuit. It is generally referred to as
8 the installation trigger case, and I do
9 not have any questions related to the law
10 or the holding. I'm only marking this as
11 a matter of convenience with respect to
12 some of the factual recitation.

13 And I direct you to what is
14 considered page four of the exhibit and in
15 the right-hand column, the first full
16 paragraph, the next to the last sentence
17 says: "According to Grace, as of early
18 1992, it had spent 184.6 million dollars
19 to settle claims or satisfy judgments in
20 property damage asbestos lawsuits and 194
21 million to defend itself."

22 Now, is that statement generally
23 consistent with your recollection of Grace
24 spending large amounts of money to defend

PP's
Ctr.

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1 itself in asbestos litigation?

2 A. Yes. As I indicated
3 before, you know, Grace had spent
4 significant amounts of money. And,
5 obviously, if they put this in here, then
6 we must have submitted information or
7 stated that we had spent that amount of
8 money so it would be consistent with what
9 I knew at the time, I think.

10 Q. And during the course of
11 this afternoon you indicated that you were
12 involved in the negotiations of the
13 settlement agreements both with the
14 primary and the excess insurers --

15 A. Correct.

16 Q. -- of Grace; is that
17 correct?

18 And you generally included where it
19 was proper a provision that those
20 agreements would provide reimbursement to
21 Grace for defense costs. Is that
22 correct?

23 A. Correct. Some of the
24 agreements are what I'm going to call

PP's
Obj:
R

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1 coverage in place agreements that had
2 ongoing obligations for the insurance
3 carriers to reimburse Grace for defense
4 costs. Some of the agreements were I'm
5 going to call buy-outs of the policies in
6 which there was no ongoing obligation.

7 Q. And when negotiating those
8 agreements, it was the understanding of
9 both parties that Grace was going to
10 vigorously defend itself and probably
11 expend money in defense costs; is that
12 correct?

13 MR. HORKOVICH: Objection
14 to form.

15 A. Well, yeah. I mean, I
16 think it was the understanding that, you
17 know, Grace would use its best efforts to
18 defend itself as best it could, you know,
19 considering all factors.

20 Q. And the next sentence of
21 that paragraph, the last sentence says,
22 "Continental has exhausted the limits of
23 its insurance coverage by paying 117
24 million dollars in defense costs and 70

PP's
Obj:
R

PP's
Obj:
R

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1 **million dollars indemnity in Grace." Is**
 2 **that generally consistent with your**
 3 **recollection?**

4 MS. ESAYIAN: Just so the
 5 record is clear, it says "and 70
 6 million in indemnity to Grace".

7 MS. DeCRISTOFARO: I'm
 8 sorry. Did I misread it?

9 MS. ESAYIAN: A little
 10 bit.

11 MS. DeCRISTOFARO: Sorry.

12 A. You know, it's a little
 13 strange to me because the indemnity -- I
 14 believe this opinion relates to the
 15 primary policies that CNA had issued to
 16 Grace. My recollection of those policies
 17 is that there was a two million dollar per
 18 year annual aggregate. So I'm trying to
 19 sort out in my mind, you know, how CNA
 20 paid 70 million in indemnity. I'm just
 21 trying to think how they got to that
 22 figure, sitting here today. I need to
 23 think about that.

24 **Q. Well, does the figure for**

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1 **defense costs seem reasonable to you?**

2 A. I --

3 **Q. Or does it refresh your**
 4 **recollection? Let me make it a simpler**
 5 **question. If it doesn't, it doesn't**
 6 **but --**

7 A. Well, again, we're talking
 8 about what numbers were in 1992. I do
 9 have a recollection, for example, that
 10 when we entered into the CNA settlement
 11 agreement in 1990, you know, that CNA had
 12 paid significant amounts of money in
 13 defense costs and probably over 100
 14 million dollars. It's just the 70 million
 15 in indemnity that I'm trying to figure out
 16 how they got to that number because
 17 sitting here today it doesn't make sense
 18 to me, not to say it's not right. I would
 19 need to think about it a little more.

20 **Q. Okay. But when you**
 21 **mentioned a little bit earlier in addition**
 22 **to the amounts set out in the settlement**
 23 **agreement there are amounts -- other**
 24 **amounts paid to Continental, this is some**

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1 **of what you were referring to; is that**
 2 **correct?**

3 A. Yeah. I mean, Continental
 4 had been defending Grace for many years
 5 and had expended --

6 **Q. Large amounts of money?**

7 A. -- large amounts of money.
 8 Some of that money was billed back to
 9 Grace and some Continental Casualty
 10 ultimately had to bear and the amounts
 11 were significant and were in addition to
 12 the 21 million dollars referenced in the
 13 settlement agreement, correct.

14 **Q. Correct. And through its**
 15 **relationship with Grace and its payment of**
 16 **these defense costs, Continental Casualty**
 17 **had an understanding that Grace was**
 18 **vigorously defending itself?**

19 MS. ESAYIAN: Objection to
 20 form.

21 MR. HORKOVICH: Objection
 22 to form.

23 A. Well, I mean, you're asking
 24 what Continental Casualty understood.

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1 It's difficult for me to answer. I mean,
 2 I could tell you that Grace had always
 3 attempted to defend itself and of course
 4 it wanted to pay out as little money as
 5 possible and didn't want to take on
 6 additional risk by trying cases where it
 7 was inappropriate. What Continental
 8 understood, I'm not quite sure.

9 **Q. Okay. When the primary**
 10 **policies were exhausted, is it correct to**
 11 **say that Grace turned to seek coverage**
 12 **from its excess insurers?**

13 A. Well, I think -- you know,
 14 I think some of the time periods overlap
 15 in the sense that Grace was seeking
 16 coverage from its primary carriers, CNA,
 17 Royal and Maryland, and then there came a
 18 point in time when the excess coverage
 19 litigation got instituted so the time
 20 frames may have overlapped in the sense
 21 that Grace was -- might have been
 22 simultaneously seeking money from the
 23 primary and the excess. But certainly
 24 after it settled with CNA it was certainly

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<p>1 seeking money from the excess as well.</p> <p>2 Q. And the excess insurers --</p> <p>3 the recovery it was seeking from the</p> <p>4 excess insurers included payment of these</p> <p>5 ongoing defense costs which were</p> <p>6 substantial?</p> <p>7 A. Yes.</p>	<p>1 right to institute later proceedings</p> <p>2 against the carriers above that level.</p> <p>3 Q. But the carriers who</p> <p>4 entered into settlement agreements with</p> <p>5 Grace understood through these litigations</p> <p>6 that Grace was incurring substantial</p> <p>7 defense costs; is that correct?</p>
<p>8 MR. HORKOVICH: Objection</p> <p>9 to form.</p>	<p>8 MR. HORKOVICH: Objection</p> <p>9 to form.</p>
<p>10 A. Grace was seeking ongoing</p> <p>11 defense costs that were unreimbursed and</p> <p>12 that we believed were properly</p> <p>13 attributable to the excess carriers.</p> <p>14 Q. So the excess carriers</p> <p>15 also -- excuse me before I go there.</p>	<p>10 A. I think that's a fair</p> <p>11 statement.</p> <p>12 Q. And they understood on that</p> <p>13 basis that Grace was vigorously defending</p> <p>14 itself for asbestos defense cases?</p>
<p>16 There was another litigation called</p> <p>17 Maryland Casualty v. Grace generally</p> <p>18 referred to as the asbestos excess</p> <p>19 litigation.</p>	<p>15 MR. HORKOVICH: Objection</p> <p>16 to form.</p>
<p>20 A. Yes.</p> <p>21 Q. And that included at the</p> <p>22 outset all of Grace's excess insurers. Is</p> <p>23 that correct?</p>	<p>17 A. Well, again, I mean, you're</p> <p>18 asking me to put what they understood. I</p> <p>19 mean, I don't know. I mean, Grace, I</p> <p>20 think, was -- it's fair to say was</p> <p>21 vigorously defending itself and I think</p> <p>22 they would have to know that. Now, what</p> <p>23 they understood or didn't understand,</p> <p>24 you'd have to ask them.</p>
<p>24 A. It certainly included a lot</p>	
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<p>1 of them. I think it included all but I'm</p> <p>2 not quite sure. It probably did but I</p> <p>3 don't remember specifically.</p>	<p>1 Q. Okay. Now, there were also</p> <p>2 a series of questions in which the term</p> <p>3 "products" was used during the course of</p> <p>4 the afternoon. Is that correct?</p>
<p>5 Q. And in that lawsuit Grace</p> <p>6 was seeking a declaration that those</p> <p>7 excess carriers owed them defense and</p> <p>8 indemnity. Is that correct?</p>	<p>5 A. Yes.</p> <p>6 Q. But in none of those</p> <p>7 questions the term "products" was defined</p> <p>8 or the definition in the policies was</p> <p>9 referred to. Is that correct?</p>
<p>9 A. Correct, yes.</p> <p>10 Q. Okay. And that litigation</p> <p>11 was ultimately resolved in large part by</p> <p>12 settlement agreements. Is that correct?</p>	<p>10 A. I think one of the</p> <p>11 gentlemen asked me to distinguish a</p> <p>12 products claim from a premises claim and</p> <p>13 then I did that without looking at a</p> <p>14 policy. I gave him, you know, my general</p> <p>15 understanding of the distinction between</p> <p>16 two kinds of claims under an insurance</p> <p>17 policy.</p>
<p>13 A. Yes. I mean, ultimately</p> <p>14 what had happened was I think we had</p> <p>15 settled with all excess carriers up to the</p> <p>16 50 million dollar layer and I think the</p> <p>17 court ruled that excess carriers above the</p> <p>18 50 million dollar layer were not ripe, so</p> <p>19 to speak, at the time because Grace -- I</p> <p>20 think Grace's liabilities, you know, at</p> <p>21 least at that time wasn't anticipated that</p> <p>22 we were going to get to that level.</p>	<p>18 Q. And do you have any present</p> <p>19 understanding as to whether the term</p> <p>20 "products" includes any operations</p> <p>21 coverage? Let me make --</p>
<p>22 So we settled with the carriers up</p> <p>23 to the 50 million dollar level and as a</p> <p>24 practical matter I think we preserved our</p>	<p>22 MR. HORKOVICH: Objection.</p> <p>23 Q. -- that specific.</p> <p>24 MR. HORKOVICH: Objection</p>